

**FEDERAL ELECTION COMMISSION**  
**999 E Street, NW**  
**Washington, D.C. 20463**

**FIRST GENERAL COUNSEL'S REPORT**

**SENSITIVE**

MUR: 5414

DATE COMPLAINT FILED: Feb. 19, 2004

DATE OF NOTIFICATION: Feb. 25, 2004

DATE ACTIVATED: May 10, 2004

EXPIRATION OF STATUTE OF LIMITATIONS:  
 October 3, 2005<sup>1</sup>

COMPLAINANT:

George Farah, Executive Director  
 Open Debates<sup>2</sup>

RESPONDENT:

Commission on Presidential Debates

RELEVANT STATUTES  
 AND REGULATIONS:

2 U.S.C. § 431(9)(B)(ii)  
 2 U.S.C. § 441b(a)  
 11 C.F.R. § 110.13  
 11 C.F.R. § 114.1(a)  
 11 C.F.R. § 114.4(f)

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

**I. INTRODUCTION**

In this matter, another in a series of complaints filed against the Commission on Presidential Debates ("CPD"), a non-profit corporation, Complainant alleges that the CPD has violated and continues to violate the prohibition on corporate contributions in the Federal Election Campaign Act of 1971, as amended ("the Act") because:

<sup>1</sup> This date is five years from October 3, 2000, the date of the first presidential debate in 2000, and the first debate about which Complainant complains that is within the statute of limitations.

<sup>2</sup> Complainant describes Open Debates as "a nonpartisan, nonprofit organization committed to reforming the presidential debate process so as to maximize voter education." Complaint at 1. Complainant has written a book on the topic of reforming the presidential debate process, entitled *No Debate. How the Republican and Democratic Parties Secretly Control the Presidential Debates* (Seven Stories Press) (2004) ("*No Debate*").

1 its staging of general election presidential debates does not fall within the "safe  
2 harbor" provision of 2 U.S.C. § 431(9)(B)(ii), which has been construed by the  
3 Federal Election Commission to exempt, under certain circumstances, corporate  
4 sponsorship of nonpartisan candidate debates from the general prohibition on  
5 corporate contributions. 11 C.F.R. § 110.13. [The CPD] accepts corporate  
6 contributions to defray the costs of staging general election presidential debates, but  
7 it does not stage those presidential debates in accordance with three of the  
8 requirements of 11 C.F.R. § 110.13: 1) [The CPD] does "endorse, support, or  
9 oppose political candidates or political parties;" 2) it does not use pre-established  
10 objective criteria as required by 11 C.F.R. § 110.13 to determine which candidates  
11 may participate in a debate; 3) and its criteria were "designed to result in the  
12 selection of certain pre-chosen participants."

13  
14 Complaint at 2. Complainant requests the Commission to prohibit the CPD from staging future  
15 candidate debates that are partially financed by corporate contributions. *Id.* at 1, 16.

16 As discussed in more detail below, the Commission and the courts have already considered  
17 and rejected most of the allegations raised by Complainant to support his claims that the CPD has  
18 violated the Commission's debate staging regulations. Complainant, however, also advances certain  
19 factual allegations that the Commission has not squarely addressed in the past: the existence and use  
20 of Memoranda of Understanding, alleged to be secret agreements between the major party  
21 campaigns, that purportedly override the CPD's publicly announced candidate selection criteria; and  
22 purported excerpts from Complainant's interviews with board members of the CPD and campaign  
23 officials, in which they allegedly express the CPD's animus toward third-party and independent  
24 candidates' participation in the debate process or support for having the major parties control the  
25 CPD's selection process.<sup>3</sup> The CPD's response to the complaint discusses and denies  
26 Complainant's allegations and provides declarations from the CPD board members whose excerpted  
27 interviews are referenced in the complaint. In addition, on July 26, 2004, Complainant filed a

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<sup>3</sup> At the time of the complaint and response, one of these board members, Senator Alan Simpson, was a sitting CPD board member. He has since resigned, *see Billy House, Bush's Camp May Cut One Debate*, THE ARIZONA REPUBLIC, September 3, 2004. None of the other board members interviewed were on the CPD board at the time the complaint was filed.

1 supplement, which he called an “addendum,” presenting what is characterized as “[t]hree additional  
2 sources of information that have been discovered since the complaint was filed”—allegations about  
3 state parties’ helping to fund one of the 2004 presidential debates and a July 11, 1988 letter to the  
4 CPD from the Internal Revenue Service (“IRS”), and various newspaper articles concerning the  
5 debates—that Complainant alleges “bolsters its claims.” Supplement at 1.<sup>4</sup>

6 This Report concludes that the complaint and the supplement, analyzed in conjunction with  
7 the CPD’s response, the relevant MUR precedent and the public record, are insufficient to trigger an  
8 investigation of the CPD’s past and continuing eligibility to stage presidential debates. Therefore,  
9 this Office recommends that the Commission find no reason to believe that the CPD violated, or  
10 continues to violate, the Act.

## 11 **II. APPLICABLE LAW AND DISCUSSION**

### 12 **A. Background**

13  
14 Since 1988, the CPD has staged presidential and vice presidential debates pursuant to  
15 2 U.S.C. § 431(9)(B)(ii)’s safe harbor provision which exempts from the definition of  
16 “expenditures” “nonpartisan activity designed to encourage individuals to vote or register to vote.”  
17 Commission regulations provide that “[n]onprofit organizations described in 26 U.S.C. 501(c)(3) or  
18 (c)(4) and which do not endorse, support, or oppose political candidates or political parties may  
19 stage candidate debates in accordance with this section and 11 C.F.R. § 114.4(f),”  
20 11 C.F.R. § 110.13(a)(1), provided that the staging organization does not structure the debates to  
21 promote or advance one candidate over another, and that the criteria for candidate selection are

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<sup>4</sup> Pursuant to the usual practice regarding supplements to complaints, this Office sent the CPD a copy of the supplement. The CPD did not respond to the supplement.

1 objective and pre-established, pursuant to 11 C.F.R. §§ 110.13(b) and (c).<sup>5</sup> *See also* 11 C.F.R.  
2 §§ 100.92 and 100.154 (exempting funds used to defray costs incurred in staging candidate debates  
3 in accordance with the provisions of 11 C.F.R. §§ 110.13 and 114.4(f) from the definitions of  
4 “contribution” and “expenditure,” respectively). Thus, if the debate staging organization meets the  
5 requirements of section 110.13(a)(1), and stages debates in accordance with sections 110.13(b) and  
6 (c) and section 114.4(f), the organization’s activities are exempt from the definitions of  
7 “contribution” and “expenditure.”

8 B. The Commission and the Courts Have Considered and Rejected Most of  
9 Complainant’s Arguments

10  
11 Complainant generally contends that the CPD is a product of the two major parties, actively  
12 promotes their interests, and is so infected with bias against third party candidates that it has  
13 violated and is violating the “nonpartisan” and “debate selection criteria” prongs of the  
14 Commission’s debate regulations. In partial support, Complainant advances the following  
15 arguments. First, he argues that the CPD is bipartisan, not nonpartisan, based on its founding by  
16 Frank J. Fahrenkopf, Jr., and Paul G. Kirk, Jr., individuals who were, at that time, chairmen of the  
17 Republican National Committee (“RNC”) and the Democratic National Committee (“DNC”),  
18 respectively, and who are still the co-chairs of the CPD. He also argues that the CPD is not  
19 “nonpartisan” based on the alleged partisan composition of the CPD’s board of directors. Second,  
20 Complainant alleges that the CPD’s 1988-1996 debate selection criteria were subjective and biased  
21 against third-party candidates. Third, he alleges that the fifteen per cent voter support threshold,  
22 which was first included in the CPD’s 2000 debate selection criteria, is subjective, too high, and

23  
<sup>5</sup> 11 C.F.R. §§ 114.4(f)(1) and (3) provide that corporations staging debates in accordance with 11 C.F.R.  
§ 110.13 may use their own funds to do so, and may also accept donations from other corporations and labor  
organizations for the purpose of staging the debates.

1 calculated to exclude third-party and independent candidates.

2 Previous MUR complainants have made the same or similar allegations. For example, in  
3 MURs 4451 and 4473, complainants alleged that the CPD's 1996 debate selection criteria were  
4 subjective and therefore violated 11 C.F.R. § 110.13(c), as did the CPD's alleged decision to invite  
5 the Democratic and Republican nominees solely on the basis of their parties' nominations. In  
6 MURs 4987, 5004, and 5021, complainants alleged that the CPD and its board of directors are  
7 bipartisan, not nonpartisan. In support, they stated that the CPD was created by the former chairmen  
8 of the DNC and RNC to allow the major parties to control the presidential and vice presidential  
9 debates and to promote their candidates, in violation of 11 C.F.R. § 110.13(a). Complainants also  
10 maintained that the CPD's 2000 debate selection criteria, particularly its requirement that debate  
11 participants demonstrate popular support levels of at least fifteen per cent, were subjective and  
12 violated 11 C.F.R. § 110.13(c). Likewise, the complainant in MUR 5207 alleged that the CPD was  
13 partisan and that the major parties monopolized the debates by arranging to limit participation to  
14 their candidates. In all of these matters, the Commission found no reason to believe that the CPD  
15 had violated the Act. In subsequent section 437g(a)(8) dismissal suits brought by some of these  
16 MUR complainants, courts found for the Commission.<sup>6</sup> Based on this precedent, these arguments  
17 should be rejected.

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<sup>6</sup> In *Buchanan v. FEC*, 112 F.Supp.2d 58 (D.D.C. 2000), *aff'd on different grounds*, No. 00-5337 (D.C. Cir. September 29, 2000) ("*Buchanan*"), brought by complainants in MUR 4987 pursuant to 2 U.S.C. § 437g(a)(8), the court upheld the Commission's determination that the CPD was an eligible debate staging organization. With respect to plaintiffs' allegation that the CPD was a partisan organization, the court stated that "the General Counsel found, and the FEC agreed, that plaintiffs failed to provide enough evidence to establish a reason to believe that the CPD" did not meet the eligibility requirements of 11 C.F.R. § 110.13(a)(1), noting that, among other things, the "General Counsel determined that plaintiffs' evidence failed to show . . . that the 'CPD is controlled by' the two major parties." 112 F.Supp. 2d at 70-71. The court noted that the evidence submitted by plaintiffs included the founding of the CPD by its two co-chairs who were then the respective chairmen of the RNC and the DNC and the composition of CPD's board as consisting largely of current and former elected officials of the two major parties and party activists. *Id.* at 71. The court concluded that "[b]ased on the factual record before it, the FEC did not abuse its discretion in finding that there was no 'reason to believe' that the CPD currently 'do[es] not endorse, support, or oppose political candidates or political parties.'" 11 C.F.R. § 110.13(a)(1)." *Id.* at 73. Plaintiffs also asserted that the CPD's debate selection criteria were not  
(footnote continues on the following page)

Further, to the extent Complainant relies on arguments rejected by the Commission and the courts as the foundation for the additional information he advances that is discussed below, that foundation has shifted considerably and is therefore shaky. For example, not only did challenges based on Fahrenkopf's and Kirk's leadership of the CPD not win the day when they were fresh, but, as neither man has been a party official since 1989, the passage of time has rendered such assertions less persuasive. As for challenges to the CPD's pre-2000 debate selection criteria, these are no longer relevant, given the CPD's 2000 selection criteria which even the complaint characterizes as "forc[ing] some transparency" (Complaint at 11). *See also* Complainant's book, *No Debate*, at 67 ("The advantage of the 2000 criteria is that it forces some transparency—candidate participation is less subject to the backdoor manipulations of Democrats and Republicans . . . CPD director Antonia Hernandez said, 'You might not like the 15 percent threshold, but it's clearly articulated, and if a person meets it, then that candidate gets in'" (quoted from a reported interview with Complainant)).

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objective and, in particular, that the fifteen per cent threshold was too high, given that the threshold to qualify a candidate's party to receive public funding is five per cent. *Id.* The court, however, found that the "15 % support level set by the CPD" was not inconsistent with the Commission's regulations, *id.* at 74, that the Commission's explanation for its decision was "sufficiently reasonable," *id.* at 76.

In *Natural Law Party v FEC*, Civ. Action No. 00CV02138 (D.D.C. September 21, 2000), *aff'd on different grounds*, No. 00-5338 (D.C. Cir. September 29, 2000), brought by complainants in MUR 5004, the court found for the Commission based on the reasoning set forth in *Buchanan*. *See also Becker v FEC*, 230 F.3d 381 (1<sup>st</sup> Cir. 2000) (rejecting challenge by Ralph Nader and others to the Commission's debate regulations). The Commission in MUR 5207 also rejected similar arguments, although the matter focused more on CPD's specific selection criteria and less on CPD's eligibility to be a sponsoring organization. Although the MUR 5207 complainant subsequently brought a section 437g(a)(8) suit in the Western District of Washington, the district court dismissed the suit on procedural grounds and the Ninth Circuit affirmed the dismissal.

Recently, in another section 437g(a)(8) dismissal suit involving a challenge to the Commission's finding of no reason to believe that CPD violated the Act in MUR 5378, a district court granted plaintiffs summary judgment in part and reversed and remanded the case to the Commission for further proceedings consistent with the court's decision. *Hagelin v FEC*, Civil Action 04-00731 (HHK). MUR 5378 involved the CPD's decision to exclude third party candidates from the audience of the October 3, 2000 debate, that decision is not raised in the instant MUR.

C. Memoranda of Understanding

1. Complainant's allegations

Complainant contends that despite the CPD's published debate selection criteria,

[q]uestions concerning third-party participation...are ultimately resolved behind closed doors, by negotiators for the Republican and Democratic candidates. These negotiators draft secret debate contracts called "Memoranda of Understanding" that dictate precisely how the debates will be run—from decreeing who will participate, to prohibiting candidate-to-candidate questioning, to stipulating the height of the podiums...Posing as an independent sponsor, the CPD implements the directives of the "Memoranda of Understanding."

Complaint at 7-8. According to Complainant, by allegedly implementing "these shared demands of the major party candidates...the CPD demonstrates clear 'support' for the Republican and Democratic candidates, and clearly 'oppose[s]' third-party and independent candidates, in violation of 11 C.F.R. § 110.13(a)." *Id.* at 9. Complainant also maintains that "[t]he 'Memoranda of Understanding'—not the CPD's criteria—were 'used to pick the [debate] participants,' and the CPD's criteria were therefore 'designed to result in the selection of pre-chosen participants' that were chosen by the major party candidates, in direct violation of 11 C.F.R. § 110.13(c)." *Id.* at 12.

In support of these propositions, which the complaint asserts were operative for the 1988, 1992, 1996 and 2000 debates (*id.* at 7-9), Complainant relates events surrounding the selection of debate participants in the last three of these election cycles. In 1992, according to Complainant, when independent presidential candidate Ross Perot reentered the presidential race on October 1st, after having withdrawn in July, the Bush and Clinton campaigns agreed that Perot should be invited to participate in the debates. Complainant alleges that the major party negotiators submitted their "Memorandum of Understanding" to the CPD, which stated that Perot would be included in the debates if he acquiesced in the terms of the agreement, and that the Memorandum further stipulated:

1 The debates will be sponsored by the [CPD], provided that the [CPD] agrees to all  
2 provisions of this agreement. In the event that the [CPD] does not accept the provisions  
3 of this Agreement or is unable to fulfill the provisions of this Agreement [sic],  
4 representatives of the two (2) candidates who are signatories to the Agreement will  
5 immediately use their best efforts to obtain a mutually agreeable alternate sponsor or  
6 sponsors for the debates on the dates set forth and only on the same terms and conditions  
7 [sic] agreed upon herein.<sup>7</sup>

8  
9 Complaint at 13. According to Complainant, when the major parties rejected the CPD's proposal  
10 that Perot be included in the first debate and that his inclusion in the next two debates would be  
11 reviewed thereafter, the CPD agreed to Perot's inclusion in all three debates.

12 With respect to 1996, when Perot ran for president again, this time as the nominee of the  
13 Reform Party, Complainant relates that the CPD unanimously approved its Advisory  
14 Committee's September 17, 1996 recommendation to invite only Senator Dole and President  
15 Clinton to participate in the events. Following the CPD's determination, according to  
16 Complainant, Dole, who allegedly wanted Perot excluded, and Clinton, who allegedly proposed  
17 that Perot be included in the first debate, agreed that Clinton could dictate the schedule and  
18 format of the debates if Clinton agreed to exclude Perot entirely. Complainant states that "[t]he  
19 major-party candidates submitted a secret 'Memorandum of Understanding,'" dated September  
20 28, 1996, "to the CPD, which stipulated, 'The participants in the two Presidential debates will be  
21 Bill Clinton and Bob Dole,'" and further included "stipulation" language similar to that included  
22 in the 1992 Memorandum of Understanding quoted *supra*. Complaint at 14-16 and Exhibit C;  
23 *see also* n. 7.

24 Finally, Complainant alleges that in 2000, George W. Bush and Al Gore did not want  
25 third-party candidates Ralph Nader or Pat Buchanan included in the debates. Complainant

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<sup>7</sup> The "stipulation" paragraph in the 1992 Memorandum of Understanding does not contain the phrases "or is unable to fulfill the provisions of this Agreement" and "only on the same terms and conditions." Exhibit B. It appears that Complainant is citing the "stipulation" paragraph from the 1996 Memorandum of Understanding. *See* Exhibit C.



alleges, citing an “anonymous interview” with him, that the “2000 ‘Memoranda of Understanding’ stipulated that the participants in the presidential debates would be Al Gore and George W. Bush,” and notes that the CPD sponsored three presidential debates that only included Gore and Bush. Complaint at 16.

2. The CPD's Response

According to the CPD, “the complaint claims—as if it were newly discovered—another well known fact: that the major party nominees negotiate directly with one another concerning various aspects of the debates.” Response at 7.<sup>8</sup> The CPD adds, however, that “[w]hat the major party nominees choose to put in agreements to which the CPD is not a party in no way binds the CPD and it does not constitute evidence of the CPD’s actual decisionmaking process.” *Id.* at 8. The CPD provides as Tab 1 to its Exhibits a Declaration of its Executive Director, Janet H. Brown (“Brown Declaration”). The Brown Declaration, assertedly based on personal knowledge, states that “[a]ny understandings or agreements between the major party nominees have not been the basis for decisions by the CPD concerning candidate eligibility to participate in the CPD’s debates; those decisions . . . have been based on a good faith application of the CPD’s published nonpartisan candidate selection criteria.” Brown Declaration at 1, 16. Moreover, according to the Brown Declaration, “[a]t no time did any campaign or the representative of any campaign have a role in the Advisory Committee’s or the CPD Board’s decision-making process.” *Id.* at 16.

More specifically with respect to the 1992 debates, the Brown Declaration maintains that at a meeting on September 9, 1992, after Perot’s July withdrawal, the Advisory Committee unanimously agreed that no non-major candidate had a realistic chance of winning the election.

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<sup>8</sup> The CPD asserts that, as an historical matter, going back to the Lincoln-Douglas debates, candidates participating in important debates have historically negotiated directly concerning aspects of those debates. See Response at 7 and Tab 14 attached thereto.

1 However, following Perot's reentry into the race on October 1, 1992, the Advisory Committee  
2 reconvened on October 5<sup>th</sup> at the CPD's request, and concluded that Perot satisfied the selection  
3 criteria; based on that recommendation, the CPD invited Perot and his vice presidential candidate to  
4 participate in the first two debates. The Brown Declaration further states that "[w]hen it became  
5 clear that the debate schedule—four debates in eight days—would prevent any meaningful  
6 reapplication of the selection criteria," the CPD recommended that Perot participate in all three  
7 presidential debates, and he did so. *Id.* at 9; *see also* Tab A to CPD Exhibits (October 7, 1992 letter  
8 to campaign chairs). According to the Brown Declaration, the 1992 Advisory Committee had faced  
9 an "unprecedented situation in which a candidate, whose standing in the polls had been  
10 approximately forty per cent, had withdrawn from the race, but then rejoined the campaign shortly  
11 before the debates, with unlimited funds to spend on television campaigning;" it ultimately decided,  
12 however, that the possibility of Perot's election was not unrealistic under a scenario where no  
13 candidate received a majority of electoral votes and the election was decided by the House of  
14 Representatives. Brown Declaration at 9-10.

15 With respect to the 1996 debates, the Brown Declaration maintains that the CPD Board  
16 unanimously accepted the Advisory Committee's recommendation that only the major party  
17 presidential and vice presidential candidates be invited to participate in the debates. The Brown  
18 Declaration states that the Advisory Committee found that Perot did not have a realistic chance of  
19 winning the 1996 election, distinguishing the circumstances from 1992 when Perot had stood at  
20 forty per cent in the polls prior to his withdrawal and was not limited by his acceptance of federal  
21 matching funds. *Id.* at 10-11.

22 Turning to the 2000 debates, the CPD observes that the Complainant does not and can not  
23 contend that any candidate that satisfied the CPD's criteria for participation was not invited to

1 attend or, conversely, that any candidate was invited who did not meet that criteria. Noting that the  
2 criteria adopted for 2000 (and 2004) are "wholly transparent in application," and that the  
3 information cited to in the "anonymous" interview is "demonstrably wrong," Response at 11-12, the  
4 CPD includes at Tab F a copy of the 2000 Memorandum of Understanding between the Bush and  
5 Gore campaigns, expressly stating that the CPD's selection criteria will govern debate candidate  
6 selection.<sup>9</sup> See also Declaration of Dorothy S. Ridings, former President of the League of Women  
7 Voters and CPD board member since 1997, at Tab 7 (describing the decision-making process  
8 leading to the adoption of the CPD's 2000 criteria, and disavowing that they were adopted with any  
9 partisan or bipartisan purpose).

10 3. Analysis

11 In their April 6, 1998 Statement of Reasons in MURs 4451 and 4473, all five of the then  
12 sitting Commissioners explained why the Commission unanimously found no reason to believe that  
13 the CPD had violated the Act in connection with its sponsorship of the 1996 presidential debates.  
14 While not squarely addressing the existence or content of any Memoranda of Understanding, the  
15 Commission stated:

16 Finally, the General Counsel's Report suggests that the Clinton/Gore Committee and the  
17 Dole/Kemp Committee expressed an interest to either include or exclude Mr. Perot and  
18 that, as a result, the two candidate committees somehow tainted the debate selection  
19 process. Absent specific evidence of a controlling role in excluding Mr. Perot, the fact  
20 that the Committees may have discussed the effect of Mr. Perot's participation on their  
21 campaigns is without legal consequence. There certainly is no credible evidence to  
22 suggest that the CPD acted upon the instructions of the two campaigns to exclude Mr.  
23 Perot.  
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<sup>9</sup> The 2000 Memorandum of Understanding provided by the CPD is labeled "draft," but it appears to have been executed by representatives of the Gore/Lieberman and Bush/Cheney campaigns (Tab F at 31). According to the Brown Declaration, the document provided "is what I understand to be a true and complete copy of the executed Memorandum of Understanding in 2000 between the Gore and Bush campaigns." Brown Declaration at 16.

1 Statement of Reasons at 11 (citations omitted); copy provided at Tab 12 to the CPD's exhibits. For  
2 the reasons discussed below, this Office believes that the Memoranda of Understanding likewise do  
3 not provide any specific or credible evidence that the major parties played a controlling role in  
4 excluding debate participants or that the CPD acted upon their instructions.

5 Although the Complainant seems to argue that the history of the Memoranda of  
6 Understanding support both his contention that the CPD is not "nonpartisan," and therefore is not  
7 qualified to be a debate staging organization under the regulations, and his contention that the CPD  
8 does not use objective selection criteria, it appears that the argument conceptually is best understood  
9 as an attack on the selection criteria. Complainant appears to be arguing that CPD's published  
10 criteria are a sham, and that the real criteria are that third-party candidates will be included or  
11 excluded from the debates based on the sufferance of the two major party candidates.

12 The 2000 Memorandum of Understanding explicitly states that "the [CPD's]  
13 Nonpartisan Candidate Selection Criteria for 2000 General Election Debate Participation shall  
14 apply to determining the candidates to be invited to participate in these debates." Tab F at 2.  
15 Complainant acknowledges that the CPD's criteria, which included the fifteen per cent polling  
16 requirement, were adopted in January 2000 (Complaint at 11), predating the 2000 Memorandum  
17 of Understanding, which is dated September 28, 2000.<sup>10</sup> It is undisputed that no candidates

<sup>10</sup> The other parts of the Memoranda of Understanding address the logistical details of the debates and have nothing to do with the selection of candidates. See Complaint at 8; see also Brown Declaration at 16. Moreover, the existence of the Memoranda has not been "secret" as claimed in the complaint. Since at least 1988, they have been described in several press articles, see Mary McGrory, *League Escapes "Charade,"* THE RECORD, NORTHERN NEW JERSEY, Oct. 9, 1988; Susan Page, *League Dumps Second Debate,* NEWSDAY, Oct. 4, 1988; Robert Tonelli, *Letter to the Editor Republicans control debates to protect their political monopoly,* THE LAS VEGAS REVIEW-JOURNAL, Sept. 29, 1996, and *No Debate*, which reports that in 1988, amid disputes over who would conduct the 1988 presidential debates, the president of the League of Women Voters "made public the secret Memorandum of Understanding—the detailed blueprint drafted by the [Bush and Dukakis] campaigns." *No Debate* at 32-33. The 2004 Memorandum has been made publicly available by Complainant (at <http://www.opendebates.org/news/agreement>), the Bush and Kerry campaigns (at <http://www.georgebush.com/News/Read.aspx?ID=3604> and [http://www.johnkerry.com/pressroom/releases/pr\\_2004\\_0920b.html](http://www.johnkerry.com/pressroom/releases/pr_2004_0920b.html), respectively) and by other organizations as well (see, e.g., <http://www.pbs.org/now/politics/debates.html> and <http://www.cnn.com/2004/ALLPOLITICS/09/27/debates.preview>).

1 other than those of the major parties met the fifteen per cent polling criterion prior to the debates  
2 and therefore, none were invited to participate in the debates. Thus, in 2000, the major parties  
3 explicitly agreed to be bound to the CPD's selection criteria, which remained in effect for the  
4 2004 debates.

5 With respect to the 1992 and 1996 Memoranda of Understanding, to the extent that  
6 Complainant is arguing that they show the CPD violated the law in connection with the 1992 or  
7 1996 presidential debates, the statute of limitations would have run on any such violations long ago.  
8 Even if the information about the 1996 Memorandum and negotiations would have caused the  
9 Commission to decide MURs 4451 and 4473 differently--which is unlikely, given that the CPD's  
10 invitation decision predated the Memorandum by eleven days--the situation changed fundamentally  
11 in 2000, when the CPD adopted the "fifteen percent support" criterion that was even more objective  
12 than the criteria considered by the Commission in MURs 4451 and 4473. The CPD is correct when  
13 it states, in effect, that in 2000 it invited all the candidates who qualified under those criteria and  
14 none of the candidates who did not, Response at 11, 14, and Complainant makes no showing to the  
15 contrary. Thus, any allegations based on the 1992 and 1996 Memoranda about what the CPD would  
16 do today were it confronted with a major-party candidate who refused to appear with or without a  
17 third-party candidate who met the CPD's current criteria, situations that are somewhat analogous to  
18 what Complainant alleges happened in 1996 and 1992, respectively, are totally speculative and  
19 hypothetical.

20 D. Interviews

21 Complainant also relies on excerpted interviews that he allegedly had with one sitting and  
22 other former members of the CPD's board of directors, as well as campaign officials, in an attempt  
23 to prove that the CPD is infected with bias against third party and independent candidates sufficient

1 to disqualify it as a debate staging organization. Specifically, Complainant quotes Senator Alan  
2 Simpson, who was still a member of the CPD's board of directors when the complaint and response  
3 in this matter were filed, *see* n. 3, as saying in a March 2002 interview, "You have a lot of  
4 thoughtful Democrats and Republicans on the commission that are interested in the American  
5 people finding out more about the two major candidates—not about independent candidates who  
6 mess things up." When Complainant asked Simpson if third-party or independent candidates should  
7 be included in the presidential debate, he allegedly responded, "No . . . I think it's obvious that  
8 independent candidates mess things up." Complaint at 7 (ellipsis in original).

9 Further, according to Complainant, Representative John Lewis, a CPD director from 1994  
10 through 1998, allegedly told him in a September 2002 interview that:

11 There's no question that having the two major parties in absolute control of the  
12 presidential debate process, and there's no question that they do, strengthens the two-  
13 party system. These are the most important events of an election, and if no other  
14 candidates are getting in the debates, the American people are just not going to hear  
15 about them, which means the two parties basically have a monopoly.

16  
17 Complaint at 7. Complainant also alleges that in July 2001 he interviewed former CPD director  
18 Representative Barbara Vucanovich, who served from 1987 through 1997, and that Vucanovich  
19 "praised Executive Director Janet Brown for being 'extremely careful to be bi-partisan.'" *Id.*  
20 Finally, according to Complainant, David Norcross, a CPD director from 1987 through 1993,  
21 allegedly acknowledged in a March 2001 interview: "[The CPD's] not really nonpartisan. It's  
22 bipartisan." *Id.*<sup>11</sup>

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<sup>11</sup> Complainant also quotes from a 1984 New York Times Op-Ed article co-written by CPD director Newton Minow stating that responsibility for staging political debates should rest with the Democratic and Republican parties and that "although entrusting such debates to the major parties is likely to exclude independent and minor-party candidates, this approach is consistent with the two-party system. Moreover, if the Democratic and Republican nominees agreed, other candidates could be included." This Office does not believe that this 20-year old newspaper article, written before the CPD was established and without additional substantiation, should be regarded as an accurate reflection of Mr. Minow's current views. Indeed, Mr. Minow, submitted a sworn declaration, stating that "[c]ontrary to the paradigm addressed in my 1984 article, the CPD, as it has actually operated . . . is not in any sense, directly or  
(footnote continues on the following page)

1 In his sworn declaration, which is appended to the CPD's Response at Tab 2, Simpson states  
2 that he does not remember Complainant having interviewed him "although it is entirely possible that  
3 such an interview took place," and observes that apparently Complainant omitted some words from  
4 the "quote" (quotation marks in original), but Simpson does not know what they are. Simpson  
5 declares that he does know, however, that the statements attributed to him in the complaint do not  
6 fully or fairly reflect his views. According to Simpson, he believes that the CPD's debates should  
7 include the leading candidates for president and vice president, regardless of party affiliation, but  
8 should exclude candidates with only marginal national electoral support; that the CPD's nonpartisan  
9 candidate selection criteria were designed to identify those candidates who have achieved electoral  
10 support levels sufficient to render them realistically as among the principal rivals for the presidency  
11 and vice-presidency; and that "the CPD's [debate selection] criteria are a careful, reasonable and  
12 appropriate approach to ensure that the leading candidates, regardless of party affiliation, are invited  
13 to participate in the CPD's debates." *Id.*

14 As to Representatives Lewis and Vucanovich and Mr. Norcross, none of them have served  
15 on the CPD's board of directors since 1998 at the latest. Only Senator Simpson was a CPD director  
16 when he was allegedly interviewed and, although his statement, as reported by Complainant, that  
17 independent candidates "mess things up" raises questions, Senator Simpson was only one of an  
18 eleven-member board of directors (Brown Declaration at 2) and does not necessarily represent the  
19 views of any other member. Further, Simpson's alleged comments, even if accurately reported, are  
20 consistent with his sworn declaration if Simpson believes, as he appears to, that allowing third-party  
21 candidates who lack national support levels of at least fifteen percent to participate in CPD-

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indirectly controlled by the major parties." In addition, Minow, who has served on the CPD Board for eleven years, repeats the same views as the former CPD board members concerning the nonpartisan nature of the CPD's candidate selection criteria and its application of them. See Tabs 3, 4 5, and 6.

1 sponsored debates would “mess things up.” In addition, Simpson’s sworn declaration, as well as the  
2 sworn declarations submitted by Lewis, Vucanovich and Norcross at Tabs 5, 4 and 6, respectively,  
3 all aver that Complainant did not fully or fairly represent their views; for his part, Complainant  
4 chose not to provide transcripts of the purported interviews.

5 With respect to Complainant’s use of isolated statements from alleged interviews he has had  
6 with presidential campaign committee representatives, including Mickey Kantor, Scott Reed, Frank  
7 Donatelli, Bobby Burchfield, and George Stephanopolous, according to the CPD, none of these  
8 individuals participated in the CPD’s decision-making processes. Therefore, their personal views,  
9 even assuming—without supporting transcripts—that Complainant presents them fully and fairly,  
10 do not provide a sufficient basis for further investigation of Complainant’s allegations concerning  
11 the CPD, particularly as the implications Complainant draws from their statements have been  
12 refuted by the declarations provided with the CPD’s response.

13 E. Supplement to the Complaint

14 1. Alleged funding of debate by state parties

15 Complainant asserts that Arizona State University, which was selected by the CPD to  
16 serve as the site of its October 13, 2004 debate, called upon the Arizona Democratic and Republican  
17 parties to help raise funds to cover debate-related costs, including what Complainant characterizes  
18 as a “\$750,000 fee award to the CPD.”<sup>12</sup> Supplement at 2; *see* Appendix A to the Supplement.  
19 Complainant’s conclusion, however, that “[s]uch activity demonstrates that the CPD does in fact  
20 ‘support, or oppose political candidates or political parties’ as prohibited by 11 C.F.R. § 110.13(a)”

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<sup>12</sup> According to the CPD’s website, “Each debate host will agree to raise \$750,000 to cover the production costs of a single debate; these funds are paid directly to the CPD and are tax-deductible. Each proposal should include a representation that host site officials have discussed the matter of financing with community leaders and are confident that the funds can be raised.” *See* <http://www.debates.org/pages/sitesel.html>.



(*id.*), is contradicted by the fact that Arizona State University, not the CPD, is the entity which was reportedly seeking funds from state parties and others. *Id.*

2. June 11, 1988 IRS Letter

Complainant attaches as Appendix B to the Supplement a letter from the IRS, which he describes as an “IRS warning” concerning the nature of the CPD’s 1988 debate selection criteria. Supplement at 2. According to Complainant, the IRS declined to issue a ruling requested by the CPD as to whether its 1988 debate selection criteria would adversely affect its tax exempt status under section 501(c)(3) of the Internal Revenue Code; Complainant argues that the IRS declined to do so “because of the subjectivity and imprecision of the proposed candidate selection criteria,” *id.* at 3, thus proving that the CPD’s 1988 debate selection criteria were not “pre-established objective” criteria, as required by 11 C.F.R. § 110.13(c).

Leaving aside that the letter is now sixteen years old, Complainant misconstrues the IRS letter when he asserts that the IRS “did not find the candidate selection criteria employed by the CPD to be ‘pre-established objective [sic].’” Supplement to Complaint at 3. Although the IRS declined to issue an advance ruling due to the “imprecise facts and circumstances,” the letter states the IRS is nonetheless “releasing [the CPD] from the condition expressed in [an earlier IRS letter] relating to the use of funds in your debates without first receiving a favorable ruling from the Internal Revenue Service,” Supplement to Complaint, Appendix B at 3. Moreover, since its inception, the CPD has consistently retained its “501(c)(3)” tax status.<sup>13</sup> Further, to the extent that Complainant is using the 1988 IRS letter to criticize the objectivity of the criteria used by the CPD

<sup>13</sup> At a press conference on April 12, 2004 which included Complainant, Open Debates announced that it had filed a complaint with the IRS against the CPD alleging that it has violated the section 501(c)(3) ban on campaign intervention by favoring the Republican and Democratic parties and excluding third-party and independent candidates from presidential debates. See <http://www.opendebates.org/newsrelatedarticles/taxnotes.html>. The Open Debates website does not indicate that the IRS has ruled on its complaint.

for its 1988-1996 debates, the Commission has already considered the criteria and found them to be compatible with the Act and the Commission regulations. As discussed, in 2000 the CPD adopted new, more transparent selection criteria. *See discussion, supra.*<sup>14</sup>

Based on the above, this Office concludes that the factual allegations presented by Complainant fail to provide a sufficient basis for further investigation of Complainant's allegations concerning the CPD. This Office therefore recommends that the Commission find no reason to believe that the Commission on Presidential Debates violated or continues to violate 2 U.S.C. § 441b(a), and close the file.

### III. RECOMMENDATIONS

1. Find no reason to believe that the Commission on Presidential Debates violated or continues to violate 2 U.S.C. § 441b(a).
2. Approve the appropriate letters.
3. Close the file.

Lawrence H. Norton  
General Counsel

Rhonda J. Vosdingh  
Associate General Counsel  
for Enforcement

12/7/04  
Date

BY:

Susan L. Lebeaux  
Susan L. Lebeaux  
Assistant General Counsel

Ruth Heilizer  
Ruth Heilizer  
Attorney

<sup>14</sup> Complainant also attached as Appendix C a number of news editorials which favor changes in the CPD – sponsored debates. Although several of the editorials make assertions about the major parties' control of the CPD that are similar to those made by Complainant, they contain no direct evidence concerning the CPD's actions or motivations.